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No. 83-1257

ALEXANDER L. STEVENS  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

SAFEWAY STORES, INCORPORATED,  
*Petitioner*  
v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and  
TEAMSTERS LOCAL 745,  
*Respondents*

On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit

RESPONDENT TEAMSTERS LOCAL 745's  
BRIEF IN OPPOSITION

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### **QUESTION PRESENTED**

Contrary to Petitioner's presentation, the question presented is not whether an employer and the Equal Employment Opportunity Commission may make a conciliation agreement granting rightful place seniority without the consent of the union representing the employer's employees, but rather whether such a conciliation agreement may be enforced, absent the consent of the union or a judicial determination concerning the issue of discrimination.

(i)

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**RESPONDENT TEAMSTERS LOCAL 745's  
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The Respondent, Teamsters Local 745, respectfully requests that this Court deny the Petition for Writ for Certiorari seeking review of the Fifth Circuit's Opinion in this case. That Opinion is reported at 714 F.2d 567.

Respondent, Teamster 745 hereby adopts the factual description and the arguments presented in the memorandum previously filed by the Equal Employment Opportunity Commission.

**REASONS WHY THE WRIT SHOULD BE DENIED**

1. As has been pointed out by the Equal Employment Opportunity Commission, Petitioner does not seek a review of any of the issues which it raised and lost in the courts below. Rather, it adopts arguments made in the Court below by the Equal Employment Opportunity Commission and seeks a review of the Fifth Circuit's determination that the conciliation agreement's retroactive seniority provisions are not enforceable over the Union's objection. In this regard, it is particularly telling that the party that made these very arguments in the Court below, the Equal Employment Opportunity Commission, has determined not to pursue them or to file a petition for a writ of certiorari in this case. It is the Equal Employment Opportunity Commission that is responsible for the enforcement of Title VII and that has special expertise in the area of conciliation agreements. However, the Agency which specifically is charged with the enforcement of Title VII, has concluded that the decision below does not present serious obstacles to the Commission's continuing efforts to enforce Title VII. The Commission notes that the factual circumstances which are presented in the instant case are unlikely to be repeated on very many occasions.

2. In addition, as is also asserted by the Equal Employment Opportunity Commission, contrary to Petitioner's assertions, there is no direct conflict between the decision below and any decision of this Court or any other court of appeals. In this regard, the Petitioner's assertion that the decision below conflicts with this Court's decision in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), is simply without basis. In *Zipes*, the awards of retroactive seniority followed a judicial determination concerning liability on the issue of discrimination, since the plaintiffs had been granted summary judgment on that issue. There has never been a

judicial determination on the issue of discrimination in the instant case.

3. This case is controlled by the Court's recent holding in *W.R. Grace & Company v. Local 759 and International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America*, \_\_\_\_ U.S. \_\_\_, 76 L.Ed.2d 298 (1983). The court below was correct in applying the decision in *W.R. Grace* to this case. In *W.R. Grace* this Court concluded that "Absent a judicial determination, the Commission, not to mention the Company, cannot alter the collective bargaining agreement without the Union's consent" [citation omitted] 76 L.Ed.2d at 310. The court below was correct in rejecting the agency's attempt to distinguish *W.R. Grace* by arguing that in that case the conciliation agreement resulted in "whole-sale destruction" of an existing collective bargaining agreement, whereas in the instant case the seniority system remained intact with the Charging Parties being assigned "merely their rightful place" within the system. As the court below properly noted, the difference in this case and *W.R. Grace* is merely one of degree. Although the basic seniority system in the collective bargaining agreement remained intact in the instant case, by assigning the four plaintiffs retroactive seniority, the seniority system provision was nonetheless altered without the consent of the Union or a judicial determination concerning discrimination. (See A22 through A25.) Accordingly, this Court's decision in *W.R. Grace & Company* is controlling and there have been no subsequent conflicting decisions in court of appeals enforcing conciliation agreements which award seniority where the union has not consented and where there has been no judicial determination concerning discrimination.

4. In sum, this case simply illustrates the difficulty faced by a union which has the obligation to represent all employees in the bargaining unit under the provisions of 29 U.S.C. § 151 *et seq.* and is thus obligated to fairly

represent not only the employee who may have been subjected to discriminatory treatment by an employer, but also the other employees in the bargaining unit. In such circumstances the union cannot responsibly consent to retroactive seniority for certain employees, which will, of course, adversely impact on certain other employees, absent a judicial determination that the employer has discriminated against the employees in the first instance. The decision in the court below in this case, as well as this Court's decision in *W.R. Grace*, ensure that the varied interests affected by a grant of retroactive seniority will be addressed.

#### CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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